

\*\*E-filed 5/22/07\*\*

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NOT FOR CITATION

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IN THE UNITED STATES DISTRICT COURT  
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FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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20 ERIC ROGERS, ) No. C 06-7232 JF (PR)  
21 vs. Petitioner, ) ORDER TO SHOW CAUSE  
22 )  
23 K. MENDOZA POWERS, Warden, )  
24 Respondent. )  
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27 Petitioner, a state prisoner proceeding pro se, filed a request for appointment of  
28 counsel on November 22, 2006. On that same day, the Court sent a notification to  
Petitioner that he did not complete a proper in forma pauperis application because he  
failed to submit his request on the Court's in forma pauperis form and failed to provide a  
certificate of funds from his prisoner account. The Court also sent a notification to  
Petitioner that he did not file a complaint or petition with his pleadings and that he must  
submit a petition within thirty days or the action would be dismissed without prejudice.

29 On December 26, 2006, Petitioner filed a motion to proceed in forma pauperis and  
30 attached a copy of the certificate of funds from his prisoner trust account.  
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1 On May 11, 2007, the Court granted petitioner's motion to proceed in forma pauperis and  
 2 denied Petitioner's motion for appointment of counsel without prejudice. The Court  
 3 granted Petitioner an extension of time to file a habeas petition within thirty days of the  
 4 Court's order. Petitioner filed a petition for a writ of habeas corpus on March 7, 2007.  
 5 The Court will order Respondent to show cause why the petition should not be granted.

6 **BACKGROUND**

7 An Alameda Superior Court jury convicted Petitioner of sale of cocaine base (Cal.  
 8 Health & Safety Code § 11352(a)). On October 16, 2003, Petitioner was sentenced to a  
 9 term of ten years in state prison. On direct appeal, the state appellate court affirmed the  
 10 judgment in 2006. The state supreme court denied a petition for review in 2006. The  
 11 instant federal habeas action was filed on November 22, 2006. The instant petition was  
 12 filed on March 7, 2007.

13 **DISCUSSION**

14 A. Standard of Review

15 A district court may entertain a petition for writ of habeas corpus "in behalf of a  
 16 person in custody pursuant to the judgment of a State court only on the ground that he is  
 17 in custody in violation of the Constitution or laws or treaties of the United States." 28  
 18 U.S.C. § 2254(a); Rose v. Hodges, 423 U.S. 19, 21 (1975).

19 A district court shall "award the writ or issue an order directing the respondent to  
 20 show cause why the writ should not be granted, unless it appears from the application that  
 21 the applicant or person detained is not entitled thereto." 28 U.S.C. § 2243.

22 B. Petitioner's Claims

23 Petitioner alleges the following claims for federal habeas relief: (1) the prosecutor  
 24 committed misconduct when he used his peremptory challenges to remove two African  
 25 women jurors; (2) Petitioner was denied due process and the right to confront witnesses  
 26 by the trial court's denial of discovery of a police report which could impeach the  
 27 credibility of police witnesses; (3) the trial court failed to properly instruct the jury sua  
 28 sponte on the meaning of the technical term "material part" which was included in CAL

1 JIC No. 2.21.2; and (4) Petitioner was denied his federal constitutional right to a jury trial  
2 and the court acted in excess of its jurisdiction in sentencing him to an upper term based  
3 on facts beyond those found true by the jury. Liberally construed, Petitioner's claims are  
4 sufficient to require a response. The Court orders Respondent to show cause why the  
5 petition should not be granted.

6 **CONCLUSION**

7 1. The Clerk shall terminate MICHAEL KNOWLES and substitute K.  
8 MENDOZA-POWERS as the Respondent in this habeas action.

9 2. The Clerk shall serve by mail a copy of this order and the petition (docket  
10 no. 8) and all attachments thereto upon Respondent and Respondent's attorney, the  
11 Attorney General of the State of California. The Clerk shall also serve a copy of this  
12 order on the Petitioner.

13 3. Respondent shall file with the Court and serve on Petitioner, within **sixty**  
14 **days** of the issuance of this order, an answer conforming in all respects to Rule 5 of the  
15 Rules Governing Section 2254 Cases, showing cause why a writ of habeas corpus should  
16 not be granted. Respondent shall file with the answer and serve on Petitioner a copy of  
17 all portions of the state trial record that have been transcribed previously and that are  
18 relevant to a determination of the issues presented by the petition.

19 If Petitioner wishes to respond to the answer, he shall do so by filing a traverse  
20 with the Court and serving a copy on Respondent within **thirty days** of his receipt of the  
21 answer.

22 4. Respondent may file a motion to dismiss on procedural grounds in lieu of  
23 an answer, as set forth in the Advisory Committee Notes to Rule 4 of the Rules  
24 Governing Section 2254 Cases. If Respondent files such a motion, Petitioner shall file  
25 with the court and serve on Respondent an opposition or statement of non-opposition  
26 within **thirty days** of receipt of the motion, and Respondent shall file with the Court and  
27 serve on Petitioner a reply within **fifteen days** of receipt of any opposition.

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1       5. It is Petitioner's responsibility to prosecute this case. Petitioner must keep  
2 the Court and all parties informed of any change of address by filing a separate paper  
3 captioned "Notice of Change of Address." He must comply with the Court's orders in a  
4 timely fashion. Failure to do so may result in the dismissal of this action for failure to  
5 prosecute pursuant to Federal Rule of Civil Procedure 41(b).

6       IT IS SO ORDERED.

7       DATED: 5/22/07



8       JEREMY FOGEL  
9       United States District Judge

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1 A copy of this order was mailed to the following:

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3 Eric Rogers  
4 P-74107  
Avenal State Prison  
P.O. Box 9  
5 Avenal, CA 93204

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